

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Duty of Candor**

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**Docket No. RM22-20-000**

**COMMENTS OF THE DEPARTMENT OF MARKET MONITORING OF THE  
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION**

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 C.F.R. §§385.212, 385.214, the Department of Market Monitoring (“DMM”), acting in its capacity as the Independent Market Monitor for the California Independent System Operator Corporation (“CAISO”), submits these comments in response to the Commission’s Notice of Proposed Rulemaking (NOPR) in this docket.

**I. Background**

The Commission’s existing regulations impose a duty of candor on entities under the Commission’s jurisdiction. Under 18 C.F.R. § 35.41(b), “a Seller must provide accurate and factual information and not submit false or misleading information, or omit material information” in its communications with the Commission, independent system operators (ISOs) and regional transmission organizations (RTOs), or ISO/RTO market monitoring units “unless Seller exercises due diligence to prevent such occurrences.” Similarly, 18 CFR 1c.1 & 1c.2 prohibits fraudulent schemes or misrepresentations in connection with a jurisdictional sale of energy or natural gas, respectively.

In the NOPR, the Commission notes that these existing rules have been generally effective but contain several gaps that may limit their overall effectiveness. Most notably, 18 CFR 35.41(b) applies to “Sellers,” which are defined under Commission regulations as “any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity, or ancillary services at market-based rates under section 205 of the Federal Power Act.”<sup>1</sup> Since this term does not cover all CAISO market participants, some CAISO market participants do not face a generally-applicable duty of candor under Commission regulations.<sup>2</sup> Intentionally false statements from such entities might only be prohibited under Commission regulations if made in violation of either 18 CFR 1c.1 and 1c.2 as part of a fraudulent or manipulative scheme.<sup>3</sup>

To address these limitations, the Commission proposes through the NOPR to create a broad duty of candor by adopting a new regulation that states:

Any entity must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, jurisdictional transmission or transportation providers, or the Electric Reliability Organization and its associated Regional Entities, where such communication relates to a matter subject to the jurisdiction of the Commission, unless the entity exercises due diligence to prevent such occurrences.

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<sup>1</sup> 18 CFR 35.36(a)(1).

<sup>2</sup> NOPR at P 22.

<sup>3</sup> *Id.*

## **II. Comments**

### **DMM supports the changes in the NOPR**

DMM supports the proposed rule creating an explicit duty of candor for all participants in communications with the Commission, all RTOs/ISOs, and their market monitoring units. As noted in the NOPR, the Commission relies on information it receives to assist in carrying out its regulatory responsibilities.<sup>4</sup> The ability to obtain accurate and truthful information is critical to the ability for the Commission to effectively enforce prohibitions on fraudulent schemes and other forms of market manipulation. Similarly, the CAISO and DMM rely on accurate and truthful information to carry out many of the responsibilities and related processes prescribed in the CAISO tariff. These rules and processes are critical to ensure market participation on a fair and equal basis, to prevent gaming and other forms of anticompetitive behavior, and to thereby foster confidence in the proper functioning of the CAISO markets.

The NOPR clarifies that some of its market participants that are not “Sellers” under the Commission’s regulations are not subject to 18 CFR 35.41(b). Such market participants include those whose activities are limited to holding congestion revenue rights, engaging in convergence bidding, providing demand response services, operating or maintaining generation resources, or serving as scheduling coordinator for one or more other participants. The NOPR explains that “absent a restriction contained in a tariff provision, there may be no explicit requirement of candor for various important communications” by such entities with the CAISO or its market monitor.<sup>5</sup> This clarification

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<sup>4</sup> NOPR, at P 3.

<sup>5</sup> NOPR, at P 22.

highlights a gap in current market rules which could significantly undermine the ability of the CAISO and DMM to continue to effectively fulfill and enforce many of the requirements in the CAISO tariff and the Commission's prohibition on fraudulent schemes and energy market manipulation.

**The CAISO and DMM rely on accurate and truthful information to carry out many of the responsibilities and related processes prescribed in the CAISO tariff.**

Without any obligation for all participants to communicate honestly and transparently with the CAISO and its market monitoring unit, the CAISO and DMM would be unable to effectively fulfill and enforce many of the requirements prescribed in the CAISO tariff in Section 37 (Rules of Conduct) and Appendix P (Market Monitoring). As explained in Section 37 of the CAISO tariff:

Section 37 sets forth the guiding principles for participation in the markets administered by the CAISO. The specified Rules of Conduct are intended to provide fair notice to Market Participants of the conduct expected of them, to provide an environment in which all parties may participate on a fair and equal basis, to redress instances of gaming and other instances of anticompetitive behavior, and thereby to foster confidence of Market Participants, ratepayers and the general public in the proper functioning of the CAISO markets.<sup>6</sup>

Section 37 enumerates various rules of conduct concerning:

- Complying with operating Instructions
- Operation and maintenance practices
- Availability of resource adequacy capacity
- Submission of feasible bids and self-schedules
- Resource availability reporting requirements
- Providing information required by all sections the CAISO tariff

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<sup>6</sup> <http://www.aiso.com/Documents/Section37-Rules-of-Conduct-asof-Jan1-2021.pdf>

Section 37 establishes sanctions and other potential consequences for violations of the specified Rules of Conduct, and sets forth procedures by which the CAISO shall investigate potential violations of the Rules of Conduct and administer enforcement activities. Section 37 requires that the CAISO “shall conduct a reasonable investigation seeking available facts, data, and other information relevant to the potential Rules of Conduct violation,” and that the CAISO “shall contact the Market Participant(s) that may be involved, so long as the CAISO has sufficient objective information to identify and verify the role of the Market Participant(s) in the potential Rules of Conduct violation.”<sup>7</sup> Rules of Conduct for which no specific sanction is specified are to be enforced by FERC and are subject to investigation and referral to the Office of Enforcement by DMM.<sup>8</sup>

Without the ability to obtain accurate and truthful information from market participants, DMM would also be unable to fulfill many of the obligations and requirements assigned to DMM as the CAISO’s market monitor under Appendix P of the CAISO tariff. Appendix P requires that “DMM shall identify and notify the FERC’s Office of Enforcement staff of instances in which a Market Participant’s behavior or the behavior of the CAISO itself is suspected to constitute a Market Violation.”<sup>9</sup> Appendix P further requires that “DMM shall make a non-public referral to FERC in all instances where DMM has reason to believe that a Market Violation has occurred” and that “DMM’s non-public

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<sup>7</sup> Section 37.8.3

<sup>8</sup> Section 37.8.2

<sup>9</sup> Appendix P, Section 5.3.

referral shall provide sufficient credible information to warrant further investigation by FERC.”<sup>10</sup> To ensure that DMM can fulfill these obligations, Appendix P provides that:

DMM may request that Market Participants or other entities whose activities may affect the operation of the CAISO Markets submit any information or data determined by DMM to be potentially relevant. This data will be subject to due safeguards to protect confidential and commercially sensitive data. Failures by Market Participants to provide such data shall be treated under Section 37 of the CAISO Tariff.<sup>11</sup>

Appendix P goes on to provide that:

In the event of failures by other entities to provide such data, the CAISO may take whatever action is available to it and appropriate for it to take, including reporting the failure to the pertinent regulatory agency, after providing such entity the opportunity to respond in writing as to the reason for the alleged failure and may include possible exclusion from the CAISO Markets or termination of any relevant CAISO agreements or certifications. Before any such action is taken, the CAISO Market Participant shall be provided the opportunity to respond in writing as to the reason for the alleged failure.<sup>12</sup>

Clearly, the CAISO and DMM could not continue to effectively fulfill these responsibilities and follow these processes without the ability to obtain accurate and truthful information from all participants and “other entities whose activities may affect the operation of the CAISO Markets.”

**The NOPR highlights a gap in current market rules which could significantly undermine the ability of FERC, the CAISO and DMM to continue to effectively enforce rules critical for the integrity of energy markets.**

Before 2011, the CAISO had a tariff provision explicitly requiring participants to submit accurate and factual information and prohibiting submission of false or misleading

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<sup>10</sup> Appendix P, Section 11.1.

<sup>11</sup> Appendix P, Section 8.5.1.

<sup>12</sup> Ibid.

information.<sup>13</sup> In the process of complying with Commission Order No. 719,<sup>14</sup> the Commission found that this prior tariff provision seemed to duplicate Commission regulations and should be removed absent the CAISO showing a particularized need for maintaining the provision.<sup>15</sup> The CAISO removed the provision in compliance with the Commission's guidance.<sup>16</sup> Since then, the CAISO and DMM have relied on the Commission's enforcement of 18 CFR 35.41(b) to deter and address cases where a market participant potentially submitted false or misleading information to the CAISO or DMM.

The NOPR now clarifies that some of its market participants that are not "Sellers" under the Commission's regulations are not subject to 18 CFR 35.41(b). This clarification highlights a gap in current market rules which could significantly undermine the ability of the CAISO and DMM to continue to effectively fulfill and enforce many of the requirements in the CAISO tariff. This gap could also undermine the ability of DMM and the Office of Enforcement to effectively enforce the provisions of 18 CFR 1c.1 & 1c.2 prohibiting fraudulent schemes or misrepresentations in connection with a jurisdictional sale of energy or natural gas, respectively.

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<sup>13</sup> Section 37.5.1 of the CAISO tariff contained language that parallels 18 CFR 35.41(b), requiring "communications by a Market Participant [to] be submitted by a responsible company official who is knowledgeable of the facts submitted" and that a market participant "shall provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with FERC, FERC-approved market monitors, FERC-approved regional transmission organizations, or FERC-approved independent system operators, or jurisdictional transmission providers, unless the Market Participant exercised due diligence to prevent such occurrences."

<sup>14</sup> Wholesale Competition in Regions with Organized Electric Market, 125 FERC ¶ 61,071 (2008) (Order No. 719).

<sup>15</sup> *California Independent System Operator Corp.*, 134 FERC ¶ 61,050, P 65 (2011) (ordering removal of CAISO tariff section 37.5.1).

<sup>16</sup> *California Independent System Operator Corp.*, Compliance Filing, FERC Docket No. ER09-1048-002 (Apr. 20, 2011) (compliance filing removing CAISO tariff section 37.5.1).

Over the last decade, the effective enforcement of these CAISO tariff provisions and FERC behavioral market rules has played a critical role in building confidence of market participants, ratepayers, and policy makers in the integrity and proper functioning of the CAISO markets. Continued enforcement of these rules is critical to ensure market participation on a fair and equal basis, to prevent gaming and other forms of anticompetitive behavior, and to thereby foster confidence in the proper functioning of the CAISO markets. Given the clarifications included in the NOPR, the expanded duty of candor proposed in the NOPR is necessary to maintain the ability of the Commission, CAISO and DMM to obtain accurate and truthful information needed to effectively enforce these CAISO tariff provisions and FERC behavioral market rules.



### III. Conclusion

DMM supports the Commission's proposal to create rules that require all ISO/RTO market participants to communicate in an honest and forthcoming manner with the Commission, ISOs/RTOs, and market monitoring units.

Respectfully submitted,

**By: /s/ Eric Hildebrandt**

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Independent Market Monitor for the  
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Dated: November 10, 2022

## CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon the parties listed on the official service lists in the above-referenced proceedings, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Folsom, California this 10<sup>th</sup> day of November, 2022.

**/s/ Jennifer Shirk**

Jennifer Shirk